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DAGNER *v.* DAGNER.

June 12, 1919.

[99 S. E. 567.]

Divorce (§ 171*)—Conclusiveness.—Since a decree denying divorce for desertion, either a vinculo or a mensa, necessarily determined that defendant had not at any time prior to the institution of that suit deserted her husband, it barred a suit for divorce for desertion by the same plaintiff against the same defendant, begun less than three years afterwards.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 748; 17 Va.-W. Va. Enc. Dig. 332.]

Appeal from Law and Chancery Court of City of Norfolk.

Bill by John Dagner against Rosa Dagner. Decree for complainant, and defendant appeals. Reversed, and bill dismissed.

L. B. Cox, of Norfolk, for appellant.

J. M. Harrison, of Norfolk, for appellee.

NORFOLK & W. RY. CO. *v.* WHITEHURST.

June 12, 1919.

[99 S. E. 568.]

1. Master and Servant (§ 129 (7)*)—Injuries to Fireman—Proximate Cause—Unlighted Switch Target.—Where fireman, to recover fallen tool, dropped from engine while running slowly in night-time, and ran into unlighted switch target in attempting to regain engine, whereby he was injured, the unlighted switch target is the proximate cause of the injury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 691; 10 Va.-W. Va. Enc. Dig. 373, 423.]

2. Master and Servant (§ 112 (4)*)—Injuries to Fireman—Proximate Cause—Unlighted Switch Target.—Where a switch target is unlighted at night, and fireman of switch engine is injured by running into it in attempting to get on slowly moving engine, the injury was a "foreseeable" one, though target was not designed to prevent such injuries, and the master is liable.

4. Appeal and Error (§ 999 (1)*)—Review—Verdict.—Where an issue of fact is fairly submitted to jury, their verdict is conclusive.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620.]

4. Master and Servant (§ 217 (1)*)—Injuries to Servant—Assumption of Risk.—A servant assumes the risks that are usually and or-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

dinarily incident to employment, and by continuing in employment he assumes such risks as become known to him during course of employment, or which are open and obvious.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 693, 694.]

5. Master and Servant (§ 210 (3)*)—Injuries to Servant—Assumption of Risk—Unlighted Switch Target.—A fireman, injured by running into unlighted switch target while attempting to get on slowly moving engine, does not assume risk of injury.

6. Appeal and Error (§ 1064 (4)*)—Harmless Error—Instructions—Modification.—Modification of requested instruction that servant assumes risk of dangers “normally and necessarily” incident to occupation, by substituting “ordinarily” for quoted words, held not prejudicial, in view of the evidence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

7. Appeal and Error (§ 1170 (3)*)—Reversal—Formal Error—Declaration Too Long.—That declaration in action for injuries to servant is too long is not ground for reversal, in view of Code 1904, §§ 3246, 3272, relating to disregard of formal errors.

Sims, J., dissenting in part.

Error to Law and Chancery Court of City of Norfolk.

Action by one Whitehurst against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Hughes, Little & Seawell, of Norfolk, and *Theo. W. Reath*, of Philadelphia, Pa., for plaintiff in error.

Daniel Coleman, *B. D. Willis*, *O. L. Shackelford*, and *N. T. Green*, all of Norfolk, for defendant in error.

RIXEY'S EX'RS *v.* COMMONWEALTH et al.

June 12, 1919.

[99 S. E. 573.]

1. Taxation (§ 271*)—Situs—Intangible Property of Decedent.—Where executors are also, though not within Code 1904, § 492, trustees, and their accounts as executors have not been closed, the intangible property of the estate is taxable to the estate for state and local taxes at the last domicile of decedent.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 101.]

2. Executors and Administrators (§ 81*)—Executor's Duties under Will—Trust.—Where the will directs the executor to invest funds belonging to the estate, no trust is superadded, but that is a part of his duties as executor.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 529.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.